Chapter 6: Policy-making in Migration (Part II): An Overall Critical Analysis of Europe’s Nascent Migration Law and Policy

Introduction
Having presented the main legislative developments regarding migration law as well as the role of, and interaction among, the key policy actors, this last chapter will endeavour to draw an overall critical analysis of Europe’s nascent migration law and policy. The analysis will be centred around two main axes: first, an overview of the general features and framework of policy-making with regard to migration; and, second a critical analysis of the content and quality of Europe’s migration policy, in particular in the post-Amsterdam era.

Considering that the existence of a clear, and most importantly a commonly accepted, framework and ultimate goal is a sine qua non condition for the development of a coherent and effective migration policy, this chapter will first examine this specific issue. A first sub-section will draw attention, in particular, to the fact that policy-making in migration traditionally did not have a consistent or clear-cut objective, but was rather, and still is, heavily influenced by a series of internal and mainly external factors. This is followed by an attempt to define the scope of migration policy at EU level and to highlight the existence of a two track approach concerning, on the one hand, aspects regarding the entry for short-term purposes and mere circulation of third country nationals – which is defined herein as migration stricto sensu – and on the other hand, more general issues regarding entry and residence for long-term purposes, which is defined as migration in the classic sense. Further, this first sub-section strives to identify the causes impeding the formation of a coherent and effective migration policy at European level.

Taking into account that the Treaty of Amsterdam constitutes a major turning point for European migration policy, a second sub-section examines in depth the extent and the meaning of the changes resulting from Amsterdam. The major question that will be posed and analysed concerns the extent to which the Treaty of Amsterdam provisions and the way these have been implemented really mark the beginning of a new era, or whether these are not quite so inno-
The second main section of this chapter examines the content and quality of the emerging Community migration policy. More specifically, it purports to assess the extent to which migration law lives up to the Tampere milestones which call for a common, comprehensive and balanced policy. The main policy issues and questions that will be examined in that respect concern: first, the breadth in terms of comprehensiveness of EU’s migration policy; second, the desired or necessary depth of the EU integration -which will be seen under the oft-posed dilemma of harmonisation or coordination; and, finally, the quite controversial issue of balance. This section will also endeavour to scrutinise the quality of the emerging European migration policy. To this end, the analysis will focus on two main issues: firstly, transparency and accountability; and secondly, human rights. Inasmuch as transparency is concerned the analysis will focus, on the one hand, on policy-making and democratic accountability issues, and on the other, on issues of legal certainty and clarity of substantive law. The human rights analysis seeks to examine the extent to which human rights considerations are important in the process of policy-making at the European level as well as the extent to which the texts that are adopted live up to international human rights standards.

6.1 An Overview of the General Features and Framework of the Emerging Migration Law and Policy

6.1.1 The Challenge of Setting a Common Framework and Goal

It has been convincingly argued that in contrast to the classic European integration process, integration in JHA is not based on a predetermined objective transformed in to law but rather on a “pyramide inversée”. Cooperation in this area started under the pressure of events, and not on the basis of a pre-existing political will, it was then institutionalised but a coherent and well-articulated political concept only emerged much later. While the same reasoning applies with regard to migration policy, certain additional facets need to be highlighted: first, the strong spill over effect that is characterising policy-making with regard to migration in conjunction with the fact that the ultimate rationale seems to change constantly, or at least there are several overlapping aims; second, the subsequent uncertainty with regard to the material and personal scope of the relevant policy and the development of two policy tracks; and, third, the existence of factors that are impeding the setting of a clear-cut objective and the formation of a coherent and effective EU policy.

1 De Lobkowicz W., L’Europe et la sécurité intérieure Une élaboration par étapes, op.cit., at p. 11-14.
2 Idem.
3 Den Boer and Wallace, op.cit., at p. 497.